BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A DENIAL OF SHORELINE SUBSTANTIAL DEVELOPMENT AND CONDITIONAL USE PERMITS BY SKAGIT COUNTY, SKAGIT SYSTEM COOPERATIVE, Appellant, v. SKAGIT COUNTY, and State of Washington DEPARTMENT OF ECOLOGY, Respondents.	SHB No. 88-14 ORDER GRANTING PARTIAL SUMMARY JUDGMENT, AND REVISED FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REVERSING PERMIT DENIAL AND GRANTING IN PART APPELLANT'S MOTION TO RECONSIDER

This case is Skagit System Cooperative's ("Cooperative") appeal of Skagit County's ("County") denial of shoreline substantial development and conditional use permits for the installation and operation of net pens for raising Atlantic salmon in North Skagit Bay, near Hope Island. The State of Washington Department of Ecology ("DOE") was joined in this action because it might be affected by the proceeding.

On November 7, 1989, after motions practice and argument, the Board granted appellant Cooperative's Cross-Motion for Summary Judgment holding that the Shorelines Hearings Board did not have jurisdiction to determine whether permit applicant Cooperative is required to obtain an NPDES or State Waste Discharge permit. This Order confirms that ruling.

The hearing on the merits was held on Novemer 7-10, 14-17, 1988 in Mt. Vernon and Lacey, and was concluded on December 9, 1988, with the filing of closing arguments. Board Members participating were Members Judith A. Bendor (Presiding), Harold S. Zimmerman, Nancy Burnett, Paul Cyr, and Gordon F. Crandall. Appellant Skagit Systems was represented by Attorney John Woodring of Woodring, Bateman & Westbrook (Olympia). Respondent Skagit County was represented by Attorneys William C. Smart and Leonard B. Barson of Keller Rohrback (Seattle). Gene Barker and Associates provided court reporter services. A site visit with the parties was held the first day.

Witnesses were sworn and testified. Exhibits were admitted and examined. Counsel's contentions were heard and read. From the foregoing the Board issued on August 11, 1989 an Order Granting Partial Summary Judgment and Final Findings of Fact, Conclusions of Law and Order, reversing the denial and remanding for issuance with conditions.

On August 17, 1989, appellant filed a Petition for Reconsideration ("Motion"). On August 23, 1989, respondent Skagit County filed an Answer and Cross-Petitioned for Reconsideration "Cross-Motion"). The parties agreed to a briefing schedule and each party filed briefs in support, briefs responding and briefs in reply. Oral argument was held on October 11, 1989, by telephone. Appellant's Motion requested that: Condition No. 1 be revised to allow the rearing of all species of salmon; Conditions No. 18, 20, and 21 be revised to provide "clarification". Respondent's Cross-Motion requested that the permit be denied, and if not denied, appellant be ordered to pay for the costs of enforcing the permit.

Having read and heard counsel's arguments, having reviewed the record, and having conferred, the Shorelines Hearings Board issues the following Revised:

FINDINGS OF FACT

Procedural History

I

In April 1987, the Cooperative filed an application for a salmon net pen project in Skagit Bay. The County issued a conditioned Determination of Non-Significance ("DNS") on August 3, 1987 for a salmon rearing operation and circulated it for comment. The DNS contained 9 mitigating conditions. The mitigated DNS was not subsequently withdrawn and no lead agency with jurisdiction asserted such.

4On October 5, 1987, the Skagit County Hearing Examiner after public hearings approved the shoreline permits subject to 18 conditions.

On January 16, 1988, the Skagit County Board of Commissioners denied the permits. Appellant timely appealed to this Board, which became our SHB No. 88-14. DOE certified the matter for appeal.

Background

II

Skagit System Cooperative is a non-profit organization composed of three Indian Treaty Tribes: the Swinomish, the Sauk Suiattle, and the Upper Skagit. All have treaty fishing rights in the Skagit River, and the Swinomish also have rights in Puget Sound. The Cooperative has about 12,000 person-hours of experience with salmon net pens, including operating one north of Hope Island in Kiket Bay.

The proposed site was chosen in North Skagit Bay in part due to ready proximity for tribal members to work there.

III

The Cooperative proposes to operate an Atlantic salmon operation that would produce 216,000 pounds annually.[1] The net pens would be

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[1] This is a relatively small project as compared to other net pen appeals recently heard by this Board (e.g., Jamestown Klallam v. Gunstone, SHB Nos. 88-4&5, 540,000 pounds; CUSS v. Swecker, SHB No. 88-38, 860,000 pounds).

located in North Skagit Bay, approximately .3 miles south of Hope Island, .7 miles west of Snee-oosh Beach which is on Fidalgo Island, and about a mile north of Goat Island. (Coordinate 122 degrees 33' 18" W. longitude, and 48 degrees 23' 27" N. latitude). The nearest residents are in Snee-oosh Beach .7 miles away. The North Fork of the Skagit River enters this Bay to the south.

IV

The net pens would be placed in water 102 to 110 feet deep, on the western side over an area known as Hunot Hole. There would be 20 net pens arranged in double rows with a 15 foot wide walkway down the length. The pens' overall outside horizontal dimensions would be 100 feet by 480 feet aligned north-south into predominant ebb tides and into the prevailing winds. The pens' total surface area would be about 1.9 acres, including the area within protective booms. There would also be five-foot diameter anchor buoys. There would be a barge on-site (25 feet by 40 feet) with a 10 foot high security/storage hut (10 feet by 25 feet) on top. Any interior lights would be shaded.

Each pen is 40 feet square by 16 feet deep, and would be covered on top by tightly stretched nets to prevent predatory birds from entering. Below water each pen would have double-netting to prevent underwater predation. These are the only predator control measures anticipated.

V

Surrounding the pens there would be see-through railings about three feet high. The pens and hut would be painted colors intended to blend in with the background.

The facility would be secured to the bottom by an anchoring system the details of which had not been fully determined. The system's strength would meet or exceed the original proposal of 3,000 pound anchors approximately every 40 feet along the perimeter. The sea bottom area encompassed is predicted to be up to 20 acres.

VI

The object of the proposal is to rear Atlantic salmon for sale. This would provide a more diversified economic and employment base for the Tribes. At this scale of production, the enterprise appears to be viable. Appellant concedes, however, it may be marginally so.

When fully operational, there would be four full-time employees on site, with more during harvesting. Hours of operation would be 8:00 a.m. to 5:00 p.m., and to 7:00 p.m. in the summer.

There would not be any new development on the shoreline as a result of this project. Sixteen to nineteen foot crew boats would make two round trips per day from the Snee-oosh Beach boat ramp which is operated by the Swinomish Tribe. Supply boats would leave from La Conner once a week. These would likely be 40 foot boats. Fish processing would be done off-site at the Tribe's facility in La Conner, or in Anacortes.

VII

Only dry, pelletized feed would be used, to be hand-fed. Antibiotics, specifically incorporated into the feed, would be used only upon determination that the fish are suffering from a bacterial infection. Only U.S. Food & Drug Adminstration approved antibiotics would be used. The treatment is likely to be used 2-3 times per year for 10 days each.

The Atlantic salmon, while being treated with antibiotics, do not gain weight. Therefore, there is an added incentive for the antibiotic applications to be kept to the minimum necessary for treatment.

The site

VIII

The proposal is within Skagit Bay, an area designated Aquatic Shoreline in the Skagit County Shoreline Master Program. SCSMP 6.04(6). All marine waters seaward of the ordinary high water mark are so designated.

The waters are Class A, "excellent" under the State water quality standards. Chapt. 90.48 RCW; Chapt. 173-201 WAC.

The currents in the area are generally strong, particularly on the ebb tide when there is a rapid water movement northeast through Tosi Passage between Hope Island and Lone Tree Point on Fidalgo

Island. Weak and variable currents do occur during slack tide. The deep Hunot Hole was created by the currents, which periodically strongly scour that particular area. A clockwise eddy forms at certain parts of the tidal cycle, carrying water from the site north and eastward towards Snee-osh Beach. During low tide, vast areas of Skagit Bay to the east and south of the site are exposed mud flats.

The site does experience high winds and waves. The waves have a chance to build due to the long fetch (open water) to the south with some of the wave energy transmitting across a jetty. The Cooperative will securely anchor the facility and protect it with booms. (See Finding of Fact V, above.) Since the pens' narrow 100 feet by 16 feet vertical profile is presented to the strongest wind and waves, this alignment lessens the impact on the structure.

We find that the currents and waves are not so excessive that a properly designed and constructed facility could not remain intact.

IX

Annually throughout Puget Sound there are periods when cold waters which are low in oxygen upwell from the bottom to the surface. During these times, dissolved oxygen ("DO") levels near the surface drop. During periods when DO levels are below 5 mg/l, the salmon are stressed and stop growing. Levels below 3 mg/l may cause mortalities. The pens' north-south alignment promotes oxygenation.

We find based on all the evidence, that the site is likely to be adequate in terms of currents and dissolved oxygen. There may, however, be brief periods particularly in late summer or early fall when supplemental methods might be needed to oxygenate waters.

X

Salinity at the site can vary considerably due to the interplay between tides and the Skagit River flows. Salinities as low as 7 ppt (parts per thousand) have been detected near the site in June. Applicant's salinity on-site measurements were done in March, not necessarily the period of concern.

From all the evidence, we find that the salinity is more probable than not appropriate for salmon net pen culture. For caution's sake, however, a condition is imposed. (See Conclusion of Law XXV.)

XI

Hope Island to the north contains a boat-access only state park. Moorage buoys exist on the north side. There are some trails to the south side of the Island.

The main north/south boat traffic predominately either uses Swinomish Channel between La Conner and Padilla Bay, or uses the passage west of Hope Island. These routes avoid Skagit Bay's low tide mud flats to the east and the brisk currents through Tosi Passage. Log tows do not use the area in or adjacent to the proposed net pens.

XII

A vast array of birds inhabit North Skagit Bay, including migratory water fowl, great blue herons, bald eagles, and hawks. Mammals also frequent the area, including harbor seals, sea lions and river otters.

All five species of native Pacific salmon have wild runs up the Skagit River. In addition there are anadromous runs of steelhead and Dolly Varden and cutthroat trout. Juvenile salmonids[2] out-migrate through Skagit Bay using the shallows to feed and acclimate to the change from fresh to saltwater. During this process, they are somewhat stressed and vulnerable.

A host of other fish inhabit the Bay, including Pacific herring, smelt, Pacific sand lance, ling cod and surf perch. Pink scallops are caught and Dungeness crabs proliferate. Eelgrass beds exist throughout the Bay at shallow depths.

Fishing

XIII

North Skagit Bay is within a larger area designated as Area 8 for salmon fishing. The Swinomish Tribe has traditionally fished for these salmon in the net pen area. Less frequent non-treaty commercial

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2 The term "salmonids" in this opinion includes both Pacific salmon and sea-run steelhead which have been reclassified as salmon.

fishing has occurred in this area, including gill netting. The most recent previous good year for non-treaty commercial Pacific salmon fishing in Area 8 was in 1987, when there were 8-9 open nights for pink salmon and one night for chums. The shallow North Skagit Bay depths at lower tides are more conducive to gill netting from small skiffs than from large boats.

Recreational fishing occurs in this area, particularly crabbing, and trolling through Hunot Hole for chinook salmon.

The beaches to the east contain shellfish. Currently, due to pollution from nearby septic systems, the beaches are posted and commercial harvesting is prohibited.

In sum, North Skagit Bay is an important, productive estuary, a vital part of the Skagit River ecosystem.

XIV

The major areas of concern in this case are:

1. Fish diseases, escapement, exotic species and increased predation;

2. Human health;

3. Sedimentation and water quality;

4. Aesthetics, noise and odor;

5. Navigation and use conflicts.

Fish Diseases

XV

A key issue is whether disease will be transmitted from net pen Atlantic salmon to the anadromous salmonids in Skagit Bay. In weighing the evidence, the Board uses the "more probable than not" factual standard, with appellant having the burden of proof.

Atlantic salmon do not breed with Pacific salmon. All efforts to breed Atlantic salmon with the steelhead have also so far failed. Escaped mature healthy Atlantic salmon have been found in limited numbers in Puget Sound (300+).

XVI

At the beginnings of the life cycle, fertilized Atlantic salmon eggs for the net pen operation would either be imported from abroad, or come from within the state. After rearing in a hatchery, the young salmon (smolts) would be transferred to the saltwater pens.

XVII

According to state law (Chapt. 75.58 RCW; Chapt. 220-77 RCW) the parent stock of any imported eggs, including the Atlantic salmon eggs, must be certified disease-free, and a health history of the hatchery and stock submitted to the State.

(Diseases originating from outside the United States are known as "exotic diseases".) Imported eggs are to be disinfected and held in 90-day quarantine. They are to be examined by state and federal inspectors. Any diseases have to be reported to the Washington State

Department of Fisheries ("DOF").

Before eggs from Washington can be transferred to a hatchery, or salmon smolts transferred from the hatchery to saltwater pens, these "fish products" have to receive a permit from the state and be certified disease-free from specified diseases. This transfer permit can be conditioned as necessary to protect wild fish.

Between the federal law (Title 50 CFR) and state law (RCW 75.58.010; Chapt. 220-77 RCW), there appears to be a basic regulatory framework designed to prevent the introduction of diseases with the importation of fish eggs, or the transfer of diseases by fish product movement to net pens within state. No evidence was presented by respondents that enforcement has not been diligent.

XVIII

Net pen salmon when held in close confines are in a higher state of stress, making the fish more vulnerable to disease. The transfer to saltwater also causes stress. The close confines also tend to facilitate the spread of disease within the net pens.

In contrast, migrating adult and juvenile Pacific salmon and steelhead are not in such close confines. There was little probative evidence that such salmonids are attracted to net pens. Chinook salmon are known to migrate at depth and through Hunot Hole. Ling cod as well as crabs are found at the depth of Hunot Hole. Juvenile out-migrating salmonids tend to stay in shallow waters.

XIX

There are several diseases of bacterial origin which net pen salmon can get and which are treatable by antibiotics.

Furunculosis is such a disease; a number of salmon species are vulnerable. There is little probative evidence that the disease has been transmitted from net pen fish to free-run salmonids.[3] In so finding, we take into account the inherent proof problems in such question.

XX

Bacteria of the genus Vibrio, including both pathogenic and nonpathogenic species, are widely distributed in the ambient water, free-swimming fish, and sediments of Puget Sound. Net pen culture may potentially lead to increased numbers of such bacteria due to the organically rich sediments. Vibrio bacteria pathogenic to fish such as Vibrio anguillarum, are not normally virulent unless the host animal is stressed. Thus, the key danger posed by such fish pathogens is whether vibrosis will be contracted by the net pen fish which are

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[3] The term "free-run" is used here to distinguish from net pen salmon. The term "wild salmon" is used for those "free-run" fish which are not of hatchery origin.

There was hearsay evidence presented about possible funnunculosis transmission from National Marine Fisheries net pen fish in Clam Bay to wild fish. The evidence was not persuasive. Nor was it vulnerable to the rigors of cross-examination to test its worth.

under stress due to their confinement.

There was no evidence presented that net pen culture has contributed to an increased incidence of vibrosis in free-run salmonids.

XXI

Diseases caused by viruses cannot be treated by antibiotics. IHN (Infectious Hematopoetic Necrosis) has been found in wild chinook salmon, hatchery rainbow trout, and net pen operations. Sockeye salmon in British Columbia which use artificial spawning channels have had serious IHN problems, with up to one-third of the salmon fry dying due to IHN. The disease is particularly virulent with young fish. IHN is a disease specifically regulated by Washington law. Chapt. 220-77 WAC. Any smolt must be certified disease-free before transfer to net pens. No evidence was presented of IHN transmission from net pen fish to free-run salmonids. We find it unlikely that this net pen operation if properly managed would cause IHN disease among such salmonids.

XXII

BKD (Bacterial Kidney Disease) has been detected in free-run salmon and in net pen operations in Washington. In net pen operations it is best handled by early detection and changes in operation. Antibiotics are not effective.

BKD first appeared in Atlantic salmon in Norway in 1980. Norway is a country with a native run of Atlantic salmon and a vast

Atlantic salmon net pen industry. Atlantic salmon fishing is very important to Norway both economically and culturally.

There are over 700 net pen operations in Norway, and 17,600,000 pounds were produced (through most of 1988). The industry began in the south, prior to the advent of licensing in 1973. Norwegian regulations were substantially revised in 1985 and current regulatory changes are in process. At the time of this hearing, there are no Norwegian regulations presented which specified minimum currents or water depths at the site, or prohibited pens near the mouths of rivers.

In Norway, BKD is currently found in free-run Atlantic salmon,[4] and was in 100 Atlantic salmon hatcheries/net pens.[4] It is likely that infected imported eggs from Scotland brought the disease to Norway. There was no evidence presented that net pen fish transmitted the disease to free-run fish.

We find that it more likely than not that Atlantic salmon net pen operation would not cause significant adverse BKD impact on free-run salmonids.

XXIII

Respondent County presented evidence on significant environmental problems in Norway caused by the Atlantic salmon parasite Gyrodactylus

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[4] Because we were not provided with a further breakdown between hatcheries and pens, we are unable to tell where the problem predominated.

Salaris. Gyrodactylus S. is not currently found in the United States, hence it is termed an "exotic disease". If detected in a hatchery, it can be easily treated. (There is some indication that the parasite may be species-specific.) This fresh water parasite is found in Norwegian waters with 18 ppt salinity or less.

Gyrodactylus S. was first seen in Norway's rivers in 1975. By 1986 Gyrodactylus S. was reported in 28-30 rivers and 9 hatcheries. The parasite had moved rapidly upstream. It had a devastating impact on the young salmon. The Norwegians determined that it was necessary to poison entire rivers to eradicate the disease. It is believed that the devastation was caused either by Norway's "enhancing" the rivers with already infected hatchery stock which caused the problem, or through the importation of infected rainbow trout. There was no evidence presented that the disease came from net pen operations.

We are unable to determine that the parasite is biologically incapable of living in the net pens in Skagit Bay. The salinities in the Bay and the vicinity of the site vary over a considerable range, due to the tides and the mixing of saltwater and fresh water from the Skagit River.

An exotic disease not yet found in the United States, with such a potentially devastating impact, is worth guarding against. We find, however, that given the regulatory requirements regarding diseases and exotic ones in particular, it is unlikely that Atlantic salmon would have Gyrodactylus S. when transferred to their saltwater pens.

XXIV

Other diseases were the subject of evidence. Ceratomxyxa shasta, a disease caused by protozoa, has occurred in the United States and in Canada's Fraser River where major Pacific salmon enhancement with hatchery stock is occurring. PKD (proliferate kidney disease) has been found in four Canadian hatcheries causing mortalities among several salmonid species. The causitive organism is not known, but the disease appears to be a problem when water temperatures exceed 15 degrees centigrade. With both diseases, there has been no evidence to date of its transmission from net pen fish to free-run populations.

An additional unknown disease has been observed in 1983-84 in Puget Sound Chinook salmon net pens. It has been descriptively termed Chinook salmon rosette agent. No evidence was presented that it affected Atlantic salmon.

Escapement, Exotic Species and Predation

XXV

Even with a well designed, well operated facility, some Atlantic salmon may inadvertently escape.

So far over 300 mature, healthy adult Atlantic salmon have been found in Puget Sound. There is strong evidence that they do not breed with Pacific salmon or steelhead. To date, the problem of escapement in Puget Sound does not appear to be a significant problem, either in

terms of disease or competition for habitat. In Norway where large numbers of salmon have escaped, the escaped Atlantic salmon are the same species as the free-run salmon, thereby facilitating habitat competition. Applicant is required to submit the final net pen design including the anchoring system design to the County for approval. (See Conclusion of Law XXV, below.)

We find more probably than not that this proposed operation will not lead to significant escapement. Any such event regardless of cause is considered a violation of the permit (See Conclusion of Law XXV, below).

XXVI

The net pens would attract dogfish and marine mammals. This might result in some slight increase in predation upon the salmonid runs. It is not likely to have a significant adverse impact.

XXVII

In sum we find, under all the evidence presented in this case, given the existing laws governing the importation of fish eggs and the transfer of smolts to salt water, the careful operation and management of this small facility, and the conditions set forth herein, that the proposed facility is not likely to have a significant adverse impact on the free-run salmonid populations.

Human Health

XXVIII

A Vibrio bacteria potentially pathogenic to humans, Vibrio parahaemolyticus ("VP"), causes gastroenteritis when people eat raw or undercooked shellfish containing the bacteria. Not all VP strains cause human illness. The organically enriched sediments under a net pen might encourage VP growth if water temperatures equal or exceed 17 degrees centigrade and salinities are less than or equal to 13 parts per thousand. Such conditions might exist in the shallow waters near the site.

The net pen operation would use antibiotics to treat diseases. (Finding of Fact VII, above). Worldwide, prolonged use of antibiotics has resulted in drug resistant bacteria pathogenic to fish. Research has shown that drug resistance is carried on "R plasmids" which are genetic entities. The R plasmids have been shown to be transferable between different bacterial hosts. Under controlled laboratory conditions, researchers have also observed the transfer of R plasmids from the fish pathogen V. anguillarum to the human pathogen V. parahaemolyticus. These R-plasmids were stably maintained.

In Japan, intensive aquaculture has occurred for decades. There the net pens are often located in dense arrays, in confined bays and inlets in shallow bodies of water. A wide array of antibiotics has been used, often for long periods of time. For over a decade Japanese

scientists have attempted to find antiobiotic resistant strains of V. parahaemolyticus in these sediments at the sites. None has been found.

Research in this area bears watching. Moreover, conditions are a necessary complement to this generalized concern. (See Conclusion of Law XXV, below.) Given the evidence and the predicted pattern of antibiotic use, we find that this proposal is not likely to cause antibiotic resistant strains of V. parahaemolyticus to appear.

XXIX

The beaches which are easterly of the net pens are at least .7 mile from the pens. They are currently closed to commercial shellfish harvesting. Residential septic tanks are failing, resulting in the unacceptably high levels of fecal coliform in the shellfish. Fecal coliform, an indicator of pollution, is an organism found in mammals and their wastes. It is not found in fish or their wastes. The shellfish, which are filter feeders, take in the organisms and concentrate them in their tissues.

There are plans to sewer the area and treat the human wastes. The United States Environmental Protection Agency ("EPA") has given a grant to aid the project. When implemented, the nearshore pollution problem should be improved. We find that the net pens are not likley to significantly contribute to this pollution problem. Any overall impact in terms of organic enrichment is further lessened by the sewage treatment efforts under way.

Sedimentation and Water Quality

XXX

Net pen operations produce solid waste in the form of fish feces and unused foods. This is estimated to be 151,000 pounds annually from the 216,000 pound fish production.[5] An EPA solids deposition model was used to calculate the pattern and depth of deposition on the seafloor, beneath and around the pens. The model used two different conversion factors to calculate the feces and lost food.

The distance which solid waste particles travel (horizontally) before settling on the bottom is a function of the particles' settling speed (density and volume), the water current velocity, and the distance to the bottom. Waste feed tends to drop fairly rapidly, and will concentrate near the net pens, covering about 16 acres of the bottom (70,000 square meters) to a depth of less than .254 inch (.1 cm).

The feces deposition is likely to be .0254 inch deep (.01 cm) over 384 acres (about 6/10 of a square mile, one square kilometer), covering a semi-elliptical area to the south and west of the site, going outside Hunot Hole.

Sediments containing waste food and feces decay, and use oxygen from surrounding water. The depth of water above the sediments

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5 Solid waste in the form of aquatic growths on net pens also will occur. No evidence was introduced that suggested it would cause a problem.

influenced by this oxygen demand is estimated to be 13.2 feet (4 meters). In this zone the solids would deplete the dissolved oxygen ("DO") by only .1 mg/L This is not a measureable effect. Additional depletion of .02 mg/L would occur when the currents exceed 1 knot (50 cm/sec) and the sediments are re-suspended. The total DO depletion, .12 mg/L, will not have a significant adverse effect on water quality. When the natural upwelling occurs, resulting in natural lowered DO levels at the surface, net-pen-caused DC lowering is unlikely to significantly exacerbate the situation.

XXXI

If background levels of nitrogen in the waters were low, then additional nitrogen from a net pen could stimulate or sustain phytoplankton blooms. Additional phytoplankton blooms could be detrimental to the environment by consuming oxygen when they die, by causing unaesthetic mats, and by directly harming the net pen fish.

We find that the background nitrogen level in North Skagit Bay is sufficiently high such that the addition of this 216,000 pound net pen operation is not likely to have any significant effect on phytoplankton blooms.[6]

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6 The Interim Guidelines for Management of Salmon Net Pens in Puget Sound (1986) further recommend that all net pens in an area contribute less than 1% of the nitrogen flux now introduced into a body of water. This project would contribute only .04% of the nitrogen flux into Skagit Bay. Even when combined with the net pen facility in Kiket Bay, the total additional nitrogen is well below this 1% level.

We find that the net pens are unlikley to cause or enhance phytoplankton blooms.

XXXII

Due to the near-pen sedimentation deposit, the benthic community is likely to be altered, with a proliferation of benthos which prefer organically rich sediments. There may possibly be some decline in benthic species diversity. We conclude that the change at this site will not have a significant adverse environmental effect.

XXXIII

Aesthetics, Noise and Odor

The nearest residence is .7 miles away. The Hope Island State Park moorage buoys are on the north side of the Island. There is no view of the facility from this moorage. There is some day-use of the beaches on the south side of the Island for picnicking and small boat landing (including kayaks). At .7 miles this small project has a low profile. A few hikers on Hope Island may have a somewhat closer view. The water-borne public will have a transitory view of the facility. The lighting will be only that required by the Coast Guard for navigation. The hut's interior lighting will be shaded.

We find that the visual impacts from this proposal are not significant. A condition prohibiting the dumping of trash further minimizes any aesthetic visual impact.

Noise can carry somewhat more readily over water than over land. The area is currently a tranquil setting, whose serenity is valued by its residents. When properly conditioned on hours of operation, generators and amplification, we find the project will not cause adverse noise impacts.

Potential odor problems can be adequately mitigated by limiting above-surface cleaning of nets to one net at a time.

XXXIV

Other Environmental Effects

The Skagit Bay is an organically rich environment, characterized by turbid waters with high sediment loads. The small net pen operations in the context of this environment with its vigorous currents are not likely to significantly diminish water clarity nor so alter the nutrient levels as to adversely affect the eelgrass beds.

Crabs may be attracted to the enriched sediments. It is unlikely that crabs will be adversely impacted. In addition, we find it is unlikely that other aquatic life not previously discussed will be harmed. Only passive predator measures, nets, will be used. (See Conclusion of Law XXV, below.)

XXXV

Navigation and Use Conflicts

The effect of the proposed development on navigation must be considered in the context of the size and configuration of the proposal, and the characteristics of the surrounding waters.

We find that there will not be significant adverse navigation or use conflicts. There is sufficient area to manuever around this facility which will utilize 2 acres of surface water and about 20 acres within the anchors. The project is unlikely to significantly impact fishing or harvesting of other aquatic life in North Skagit Bay.

XXXVI

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

This Board determines the case de novo. Appellant has the burden of proof.

The Board reviews the proposed project for consistencty with the Shoreline Management Act (Chpt. 90.58 RCW; "SMA"), its implementing regulations Chapts. 173-14, and the Skagit County Shoreline Master Program ("SCSMP"). The Board has jurisdiction over these parties.

II

The parties participated in a prehearing conference. As a result a Pre-Hearing Order issued which governed the proceedings. The Order listed the legal issues in this appeal:

1. Whether the proposed project is in compliance with the Shoreline Management Act (SMA) at 90.58.020.

2. Whether the project meets the requirements of WAC 173-15-050(1) and -060(2).

3. Whether the project is consistent with the policies under the Skagit County Shoreline Master Program at Sections 5.03 (Policies for Shorelines of Statewide Significance), 7.02, and 6.04.2, .5 and .6.

4. Whether the project meets with the standards and conditions for granting a conditional use permit under the SCSMP at Section 11.03 (Criteria for Granting Conditional Use Permits), and under the State regulations.

5. Whether the project complies with the Interim Guidelines for Management of Salmon Net Pens in Puget Sound, 1986, developed by the Departments of Ecology, Fisheries, Agriculture and Natural Resources.

6. Whether the project is otherwise consistent with parallel state WAC regulatory provisions.

III

Respondent moved for Partial Summary Judgment on September 29, 1989 contending that as a matter of law appellant Cooperative was required to obtain an NPDES or state waste discharge permit (collectively: "discharge permit"). Appellant Cooperative cross-moved to eliminate that legal issue from this case. Respondent DOE joined appellant contending that as a matter of law the Shorelines Hearings Board did not have jurisdiction to decide whether such permits were required. Oral argument was heard. We reviewed the parties' contentions, agreed with appellant Cooperative and respondent DOE, and announced the result to the parties prior to hearing. We hereby affirm that ruling in writing.

The SHB is a quasi-judicial Board, one whose jurisdiction regarding shoreline permits is limited to that specified by statute or

necessarily implied. RCW 90.58.180. Under state law, RCW 90.48.260, the Department of Ecology is the sole agency authorized to issue discharge permits. Those permit decisions are appealable to the Pollution Control Hearings Board. RCW 43.21B.110.

The SHB simply does not have jurisdiction over whether a proposed project requires permits other than shoreline permits. Skagit County's reliance on the Environmental Coordination Procedures Act, Chapt. 90.62 RCW, is misplaced. That statute gives the project proponent the discretion to submit a master application to Ecology requesting the issuance of all permits necessary for the project's operation. RCW 90.62.040. The Cooperative has chosen not to do so. Nothing in that Act gives the County the right to insist as a matter of law that the Cooperative submit a master application.

Skagit County is not without a forum to pursue this discharge permit issue. It can file a separate action against DOE in Superior Court pursuant to Chapt. 7.24 RCW. At this juncture we take judicial notice that the Department of Ecology has agreed to implement the U.S. Environmental Protection Agency's determination that NPDES waste discharge permits are required for net pen operations.

IV

Legal Issue No. 5, compliance with the Interim Guidelines, is not a legal issue. The Recommended Interim Guidelines for the Management of Salmon Net Pen Cultures in Puget Sound (1986), have no legal status

and are advisory only. They are intended to provide a basis for managing salmon net pen operations in Puget Sound until completion of a Programmatic Environmental Impact Statement ("PEIS"). The Interim Guidelines were circulated to some degree for comment. This circulation did not follow provisions in the extant State Administrative Procedures Act, Chapt. 34.04 RCW. The Guidelines have not been adopted into State regulation.

The Guidelines' criteria provide some minimum standards to protect the health of the net pen salmon. Whether the criteria are sufficient to protect the environment depends upon the facts in each case.

V

During the hearing, in response to a motion and argument to strike a witness, the Board ruled that it did not have jurisdiction to consider whether a witness may have contravened the Executive Branch Conflict of Interest Statute, Chapt. 42.18 RCW. The Board opined that enforcement of that statute belongs with the head of the agency where the witness is employed. RCW 42.18.250. Moreover, the Board held that it was not persuaded that the remedy for such violation in an SHB proceeding was to prevent the witness from testifying. We re-affirm that earlier ruling.

Regardless, during the hearing the County fully exercised its rights to voir dire and cross-examine the witness, testing credibility and knowledge.

LEGAL ISSUE NO. 1 - COMPLIANCE WITH THE SMA

VI

The proposed project is in a shoreline of state-wide significance. RCW 90.58.030(2)(e)(ii)(E). SCSMP 5.02. The project must therefore demonstrate compliance with the goals and policies enumerated in the SMA at RCW 90.58.020. The SMA goals are:

(1) Recognize and protect the state-wide interest over local interest;
(2) Preserve the natural character of the shoreline;
(3) Result in long term over short term benefit;
(4) Protect the resources and ecology of the shoreline;
(5) Increase public access to publicly owned areas of the shorelines; and
(6) Increase recreational opportunities for the public the shoreline.

(Goal 7 is not relevant.)

VII

A salmon net pen operation is aquaculture. It is a water-dependent use. RCW 90.58.020; WAC 173-16-060(2); SCSMP 3.03(8).

VIII

We conclude that this project is governed by the SMP specific policies and regulations for aquaculture, Section 7.02, rather than the more general ones for Commercial Development, Section 7.03. See Holland v. Kitsap County, SHB 86-22.

Therefore, compliance with SMP 7.03 is not relevant and will not be further addressed in this opinion.

IX

Aquaculture is an allowed use in the Aquatic Shoreline

Environment subject to use regulations. SCSMP Chapt. 7 Matrix (at p. 7-2) A conditional use permit is required by the SMP because the area is in a shoreline of statewide significance. 7.02.2.B.(11).

Therefore the project must also comply with conditional use regulations at WAC 173-14-140 and SCSMP 11.03. As such, the project shall not interfere with the normal public use of public shorelines. The site and design have to be compatible with other permitted uses in the area. The project shall not cause unreasonable adverse effects to the shoreline environment in which it is located, and the public interest is not to be substantially detrimentally affected. WAC 173-14-140(1). SCSMP 11.03(1) is to the same effect. Moreover, consideration must be given to the cumulative impact of additional requests for like actions in the area. WAC 173-14-140(4); SCSMP 11.03(4)

X

The SMA regulations for Shoreline Plans define "estuary" in the state regulations, WAC 173-16-050(5), in pertinent part as:

> [. . .] that portion of a coastal stream influenced by the tide of the marine waters into which it flows and within which the sea water is measurably diluted with freshwater derived from land drainage.
>
> Estuaries are zones of ecological transition between fresh and saltwater. The coastal brackish water areas are rich in aquatic life, some species of which are important food organisms for anadromous fish species which use these areas for feeding, rearing, and migration. An estuarine area left untouched by man is rare since historically they have been the sites for major cities and port developments. Because of their importance in the

> food production chain and their natural beauty, the limited estuarial areas require careful attention in the planning function. [. . .]

Estuaries and estuarine zones are defined in the SCSMP in Chapt. 3 in a more limited way:

> [. . .] the zero gradient section of a stream where it flows into a standing body of water together with associated natural wetlands; tidal flows reverse flow in this zone twice daily, determining its upstream limit. [. . .] p. 3-7

We conclude that the site is within an estuary because the water near the site has highly variable salinity (as low as 7 ppt., i.e. fresh), is surrounded by low depth water and eeelgrass beds, and has estuarine aquatic life. See WAC 173-16-050(5).

XI

The SCSMP Objective for Aquatic Shoreline designation states:

> [. . .] intended to encourage and protect appropriate multiple uses of the water or, in some cases, single purpose, dominant uses in limited areas; to manage and protect the limited water surfaces and foreshores from inappropriate activities or encroachment; and, to preserve and wisely use the area's natural features and resources which are substantially different and diverse in character from those of the adjoining uplands and backshores. 6.04.b.

The relevant SCSMP Management Policies at 6.04.6.d are:

> (1) Aquatic Shoreline Areas should allow for compatible, appropriate uses that do not conflict with natural and cultural processes and features of the water body and associated wetlands. Such uses should be shoreline and water dependent.

[. . .]

(3) During proposal review, the protection, enhancement, and/or proper sustained yield utilization of the natural resources of the Aquatic Shoreline Area should be of primary consideration.

[. . .]

(5) Diverse public access opportunities to public water bodies should be encouraged and developed and should be compatible with the existing shorelines and water body uses and environment.

[. . .]

(7) Priority should be given to those activities which create the least environmental impact to this shoreline area.

[. . .]

(9) Abandoned and neglected structures in the Aquatic Shoreline Area which cause adverse visual impacts and are a hazard to public safety and welfare should be removed or restored to a usable condition.

XII

LEGAL ISSUE NO. 2, COMPLIANCE WITH CHAPT. 193-15 (sic.) WAC

Chapt. 173-15 WAC does not exist. We understand Legal Issue No. 2 to be a reference to Chapt. 173-16 WAC, Shoreline Management Act Guidelines for the Development of Master Programs.

We conclude that conformance with Chapt. 173-16 WAC is not a proper legal issue in this appeal. That Chapter guides the development of local Shoreline Master Programs, not the review of permits on a case-by-case basis. Rather, it is Chapt. 173-14 WAC

which constitutes state shoreline permit regulations, as complemented by the local SMP which becomes state regulation upon its approval by DOE.

LEGAL ISSUE NO. 3, COMPLIANCE WITH THE SCSMP

XIII

SCSMP Section 6.04 defines shoreline area designations and their objectives, policies, and use regulations. Section 6.04.2 addresses Rural Residential environments. Section 6.04.4 addresses Conservancy environments. Legal issues regarding these environments were not litigated in the hearing and will not be further addressed in this opinion. SCSMP Section 6.04.5 addresses Natural Shoreline environments. This will be addressed at Conclusion of Law XV, below.

SCSMP 6.04.6.d.(7) addresses the planning function, the prioritization of activities on the shoreline, not a case-by-case review, and is therefore not a legal issue in this case.

XIV

Compliance with the following SCSMP Aquatic Shoreline policies and use regulations are at issue:

7.02

1. POLICIES

C. Estuaries

Estuaries should be protected to sustain and foster their natural productivity.

D. Location

[. . .]

(2) Aquacultural enterprises should not be located in main navigational channels, commercial traffic corridors, and historically active commercial fishing areas. Other forms of navigation should be routed to minimize hazards to aquacultural projects and structures.

[. . .]

F. Impact

Aquacultural practices should be permitted on shorelines provided that their operations do not have a significant adverse impact and do not materially interfere with the normal public use of the water and shorelines of statewide significance. Previous unrestricted recreational use of the surface of the waters should not be grounds for denial of the proposal.

[. . .]

2. REGULATIONS

A. Shoreline Areas

[. . .]

(6) Aquatic

1. Structures, either fixed or floating, or shoreline alterations are not permitted on bottomlands and surface waters abutting a Natural Shoreline area.

[. . .]

3. All other aquacultural activities are permitted subject to the General and Tabular Regulations.

B. General

8. Operation

Aquaculture operations:

a. Shall minimize all nuisance factors such as noise and odors.

b. Shall not dispose of wastes, oils, toxic materials, or other effluent in violation of water quality standards or so that such materials would degrade the shoreline and water environment.

c. Shall not dispose of fish, shellfish, or solid or liquid wastes nor abandon equipment, structures, or other materials in the shoreline and water areas. Disposal of shells is allowed when done to maintain shellfish cultivation beds.

XV

We conclude that the net pen operations do not "abut" a Natural Shoreline, (Hope Island), as that phrase is used in SCSMP use regulation 7.02.2.A(6).

The SCSMP does not define "abut", so we refer to the dictionary:

> to border on: reach or touch with an end. Webster's Third New International.

Interpretations are to be avoided which do not internally harmonize with the SMP or lead to absurd results. Hope Island as a Natural Area has to necessarily touch some part of an Aquatic area, for it is an island and waters are fluid. We interpret "abut" to mean nearby or adjacent. We conclude that .3 miles is not nearby or adjacent, and therefore the project does not contravene SCSMP 7.02.2.A(6). Such interpretation makes sense in the overall context of the SCSMP, which

allows aquaculture in Aquatic Shorelines while still protecting the values of Natural Areas.

XVI

We conclude that the Skagit Bay estuary is protected and its natural productivity not jeopardized by this project as conditioned. Therefore, SCSMP Objective 6.04.6.b., and Policies 6.04.6.d(1) and (3) and 7.02.1.C are not contravened.

XVII

We conclude that the facility is not located in a main navigation channel or in a commercial traffic corridor. The facility is, however, in a historically active commercial fishing area. The intrusion is not extensive, encumbering only 20 acres and does not significantly interfere with other uses. (Finding of Fact XXXV, above.) In light of the overall SCSMP, we interpret the 7.02.1.D(2) policy as advisory, not an absolute prohibition of aqua-culture where other uses can co-exist. See, San Juan County v. DOE, SHB No. 88-52 (April 2, 1989, at Conclusion of Law XIII). 7.02.1.D(2) is a policy which uses the word "should", not a use regulation using the word "shall". Where both the words "should" and "shall" are used in the SMP, the words are presumed to have different meanings. See, Tennant v. Roys, 44 Wn. App. 305, 314, 722 P.2d 848 (1986). "Should" is an advisory "bridge" between the more general SMP goals, and the more specific use regulations. WAC 173-16-040(2). In the context of an

SMP, policies are to provide "an indication of needed environmental designations and use regulations." Ibid. Neither the SCSMP aquatic environment nor the use regulations absolutely prohibit aquaculture in historic fishing areas. Had the County wanted an absolute prohibition, it could have endeavored to do so through specific use regulation(s). See, Toandos Peninsula Association v. Jefferson County, 32 Wn. App. 473, 648 P.2d 448 (1982).

We conclude that SCSMP 6.04.6.b and 7.02.1.D(2) are not contravened.

XVIII

We conclude that the project as conditioned herein, will minimize nuisance factors, will not violate water quality standards, nor degrade the shoreline and water environment. Therefore, SCSMP policy 6.04.6.d(9) and regulations 7.02.2.B(8)(a) and (b) are not contravened.

XIX

Section 7.02.2.B(8)(c)'s prohibition against waste is to be interpreted to be in harmony with the SCSMP. Even the most carefully managed salmon net pen aquaculture operation will have feces and waste feed entering the waters. We conclude that such carefully managed wastes are not "disposed of" as that term is used in 7.02.2.B(8). To conclude otherwise would read into the SCSMP prohibition of net pens. Such implicit prohibition would contravene the overall SCSMP.

Conditions have been added to explicitly prevent disposing of

trash in the waters, and prohibiting storage on-site of hazardous chemicals, more than 10 gallons of petroleum, or more than three days of feed containing antibiotics. Abandoned structures will be removed. Therefore, as conditioned, SCSMP 7.02.2.B(8)(c) is satisfied.

LEGAL ISSUE No. 4, SHORELINES OF STATE-WIDE SIGNIFICANCE

XX

A properly-operated salmon net pen facility serves a statewide interest through the production of food. Tailfin v. Skagit County, SHB 86-29. Siting in Skagit Bay is consistent with multiple use. See, SCSMP 6.04.6.b. Since we have prevously concluded that the Skagit Bay and its estuary will be protected, the statewide interest is recognized and protected. RCW 90.58.020.

XXI

Any development would to some degree impinge upon the preservation of the shoreline's natural character. We conclude that the degree of intrusion from this relatively small project is not significant and the relevant RCW 90.58.020 goal is satisfied.

XXII

Long term benefits would result from a successful net pen operation. If it were not successful, any facilities would be removed. Therefore, that RCW 90.58.020 goal and SCSMP 6.04.6.d(9) are satisfied.

XXIII

We conclude that there is no significant decrease of public access to publicly owned areas of shoreline. The reduction in navigable waters is limited. Therefore, the RCW 90.58.020 goals and SCSMP 6.04.6.d(5) policy are satisfied.

XXIV

The conditional use provisions at WAC 173-14-140 and SCSMP 11.03 are subsumed by the above discussion and are satisfied.

By approving this one conditional use permit, we are not suggesting in any way that further net pens applications should necessarily be approved in the area. To the contrary, given the importance of the estuary and of the anadromous salmonid runs in the Skagit River, and the potential cumulative effect of additional proposals, great caution is advised. WAC 173-14-140(4).

XXV

Conditions

We conclude that the project is consistent with the SMA and SCSMP provided it is conditioned to mitigate potential adverse impacts. All conditions apply to any successor of the applicant. Eighteen of these conditions originated from the Skagit County Commissioner process or from the Skagit County Hearing Examiner. The following conditions were not the subject of the Motions on Reconsideration:

2. Once the pens are stocked, if the raising of net pen fish is discontinued for a period of six months, the facility shall be removed.

3. The applicant shall not transfer ownership or the responsibility for the operation of the facility to a new owner or operator without prior notice, and prior proof to the County of the new owner and operator's recognition of these conditions and their ability to comply.

4. The facility's hours of operation when personnel are on-site are limited from 8 a.m. to 5 p.m. (7 p.m. in the summer), except for normal security activities.

5. Methods to control predators other than nets are prohibited.

6. Harvested fish shall not be bled or processed on-site. Fish slaughter waste shall be disposed of at an onshore processing facility, and shall not be permitted to enter the waters of the state.

7. Fish, whether alive or dead, shall neither be released nor allowed to enter the waters of the state outside of the net pens.

8. Trash shall not be released into waters of the state, but instead shall be disposed of on shore appropriately.

9. Only one net at a time can be above water on-site for cleaning. On-site cleaning shall be limited to allowing the net to dry above the water surface. No high pressure washing is allowed on-site.

10. Antifouling paints or other chemical methods for controlling growth on the nets are prohibited.

11. Any generators or water pumps used shall have better-than-original mufflers. Amplified devices such as radios, cds, tape players, other than devices which directly connect to the listener's ear or which cannot be heard more than 75 feet from the site, are prohibited.

12. Storage on-site of hazardous chemicals, petroleum products (other than one Coast-Guard-approved 10 gallon fuel tank), or more than three days of feed which contain antibiotics, is prohibited.

13. Only dry pelletized feed shall be used. The fish shall be fed by that means which best minimizes waste.

Antibiotics use is limited to FDA-approved ones, and shall be limited to the treatment of diseases. Antibiotic feed shall be administered only after diagnosis by a qualified fish pathologist or veterinarian. Records shall be kept of all disease diagnosis, duration, treatment, effect, and all antibiotic use. Applicant shall work with the Department of Ecology ("DOE") to develop this record keeping system and these records shall be available for inspection.

14. All incidences of diseases shall be reported to the County and DOE within a time period and in a format as specified by them.

15. Fish escapements shall be reported to the County and DOE within a time period and in a format as specified by them. In particular, any significant escapement is a violation of this permit.

16. The facility including the boat ramp area, shall be maintained and operated in a clean, orderly and sound manner to avoid a messy or dilapidated appearance. The hut's use is limited to activities directly related to this project. Modifications, additions or expansion of the hut are not allowed by this permit. Any interior hut lights shall be shaded.

17. Applicant shall obtain all necessary and applicable leases and permits from other agencies with jurisdiction, including the Department of Natural Resources and the Army Corps of Engineers, and shall provide copies to the County and DOE.

19. The applicant shall design the facility to have appropriate markings and lights to conform with the Coast Guard requirements so as to not be a navigational hazard. The lights shall not exceed the Coast Guard standards by any appreciable amount, in order to avoid a night time visual nuisance to shore residents.

22. After installation of the net pens but prior to stocking with fish, the applicant shall complete a benthic baseline survey consisting of sediment chemistry and benthic informal sampling as outlined in the Interim Guidelines and provide a copy of the reports with the raw data attached to the County and DOE.

23. After the pens are stocked with fish, annual monitoring shall be done as outlined in the Interim Guidelines to include:

a) Benthic survey
b) Water quality survey
c) Hydrographic survey

An annual report as outlined in the Interim Guidelines with analysis and interpretation shall be prepared. A copy of the report with the raw data attached shall be submitted annually to the County and DOE. Any unusual or unexpected results shall be brought to these entities' attention.

24. The DOE may specify another governmental entity (such as the Department of Fisheries) to be the recipient of documents/reports/notifications instead of DOE.

Both the County and DOE shall also inform the permittee which sub-unit or individual is to be the particular recipient(s). The governments should keep these lists current.

XXVI

Conditions Subject to Appellant's Motion to Reconsider

Condition No. 1: Only Atlantic salmon shall be raised. Productions shall not exceed 216,000 pounds annually. Adequate records shall be maintained and shall be available for inspection.

Appellant proposes that this condition not include the limitation to "Atlantic salmon". Appellant claims that this condition is not supported by the evidence and places the Cooperative at a significant competitive disadvantage with other Puget Sound salmon net pen operations. Respondent opposes the modification.

We AFFIRM this condition and DENY appellant's Motion. The record and this Opinion fully support this condition. It was appellant's choice to present their case relying on Atlantic salmon.

The evidence was received and reviewed in that context.

XXVII

> Condition No. 18: The final net pen design, including the anchoring system, shall be submitted to the County for approval prior to any installation. A weather study shall be conducted to assist in the anchoring design, and shall be filed with the County.

Appellant moved to have Condition No. 18 "clarified" with the following language inserted before the last sentence:

> The net-pen design, including the anchoring system, shall be recognized acceptable and economically feasible within the marine, net-pen industry. The County approval shall not be unreasonably withheld.

Respondent County opposes this change.

We conclude appellant's proposed industry-wide economic feasibility test was not litigated and there is no support in the record for the inclusion of such a broad test.

In issuing an Order, the Board presumes that the government will act reasonably. Therefore, language on reasonableness is surplusage and not necessary. However, we believe it is prudent to specify a timeframe within which the government is to act. See, WAC 173-14-130. Therefore, Condition No. 18 is MODIFIED herein:

> Condition No. 18: The final net pen design, including the anchoring system, shall be submitted to the County for approval prior to any installation. A weather study shall be conducted to assist in the anchoring design, and shall be filed with the County. The County shall render and transmit its decision to the permittee within 30 days of the receipt of the final design.

XVIII

Appellants moved to have Condition No. 20 "clarified" as follows:

> Prior to stocking the pens with fish, applicant shall complete a hydrographic survey and a divers survey which shall be (~~done during periods specified by the County~~) completed pursuant to the Interm Guidelines. The reports of the surveys shall be prepared with raw data attached, and submitted to the County and DOE at no less than 60 days prior to stocking with fish.

Respondent opposes this change on several grounds, including:

1. The divers' survey has to be conducted during spring and summer months when the eelgrass stands (which are habitats of special significance) are apparent.

2. The language of the Interim Guidelines does not require a diver's survey when site depths are greater than 75 feet and thus the proposed "pursuant to the Interim Guidelines" language would nullify the condition.

It is this Board's conclusion that the surveys shall be done for this project, regardless of what the Interim Guidelines might say about depths. (See Conclusions of Law IV; Interim Guidelines not law.) The County contends that the divers' survey should be done when the eelgrass habitat is apparent. This is supported by the evidence. Condition No. 20, is MODIFIED herein:

> 20. Prior to stocking the pens with fish, applicant shall complete a hydrographic survey, and a divers' survey which shall be done when the eelgrass beds are apparent at a period further specified by the County. The surveys shall otherwise follow the Interim Guidelines' format.

The reports of the surveys shall be prepared with raw data attached, and submitted to the County and DOE at no less than 60 days prior to stocking with fish.

XXIX

Condition No. 21: Appellant requests that Condition No. 21 be clarified as follows:

> After installation of the pens with anchoring, but prior to stocking with fish, the applicant shall submit to the County a record of survey, signed by a registered surveyor, and other data attesting that the location of the facility, to mean exclusively the net-pens, and associated netting and walkways, is at the site specified in the application and at a water depth of no less than 102 feet. If there is a conflict, the minimum depth shall prevail.

Respondent opposes this clarification.

We GRANT appellant's Motion. It was always the Board's view based on the evidence that the location of the facility meant the net-pens and associated netting and walkways.

XXXI

Respondent filed a Cross-Motion on August 23, 1989 requesting the Board reverse its August 11, 1989 Order. Appellant contends that Respondent's Cross-Motion was not timely, and further contends that if it were timely the Cross-Motion be denied.

We conclude that the Cross-Motion was timely. See, Rule of Appellate Procedure 5.2. Appellant filed its Motion for Reconsideration on August 17, 1989, which was timely under WAC 461-08-220. Respondent's Cross-Motion was filed only six days

later. Appellant's own Motion tolled the eight-day requirement of WAC 461-08-220. The new Administrative Procedure Act, Chapt. 34.05 RCW, is not applicable in this case.

For the reasons previously outlined, we DENY the County's Cross-Motion to Reconsider and Reverse.

XXXII

The County's Cross-Motion, in the alternative, contends that appellant should be required to pay for the costs of enforcing the permit conditions. The County contends this Board has the authority to impose such costs, but does not support its argument with any legal citations. We DENY this motion.

XXXIII

None of these conditions otherwise limits the County's power to rescind the permit or DOE's power to petition this Board for rescission pursuant to RCW 90.58.140(8), nor limit in any way, governmental emergency powers.

XXXIV

Any Finding of Fact deemed to a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

ORDER

Appellant's Cross-Motion to delete the NPDES/state waste discharge permit legal issue was GRANTED and is hereby RE-AFFIRMED.

The denial of shoreline substantial development and conditional use permits is REVERSED. Appellant's Motion for Reconsideration is GRANTED IN PART. Respondent's Cross-Motion for Reconsideration is DENIED. The matter is REMANDED for issuance of these permits containing the conditions as set forth above.

DONE this 31st day of October, 1989.

SHORELINES HEARINGS BOARD

JUDITH A. BENDOR, Presiding

HAROLD S. ZIMMERMAN, Member

NANCY BURNETT, Member

PAUL CYR, Member

GORDON F. CRANDALL, Member